NAZIRAH ISMAIL

v.

MOHAMED FAUZY ABDUL HAMID

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA J
[SUIT NO: S3-22-319-1997]
7 JUNE 2004

CONTRACT: *Sale and purchase of land - Agreement - Termination by vendor on ground of no consideration - Whether termination proper - Whether purchaser had caveatable interest on land upon execution of agreement - Whether there was undue delay on part of purchaser in removing caveat - Whether there was breach of agreement by purchaser*

By an agreement dated 8 June 1996 ('agreement'), the plaintiff agreed to sell a piece of land to the defendant, a dealer in imported cars. The mode of payment, as stipulated under the agreement, included a sum of money and the due transfer of a Mercedes Benz registered under the name of the plaintiff. Upon execution of the agreement, the defendant lodged a caveat against the land to protect his interest under the agreement. However, on the date of execution of the agreement, the defendant failed to deliver the car as agreed. Maintaining that after 18 June 1996 the agreement had come to an end on the ground that there was no consideration, the plaintiff subsequently found another offer from PW2, also a car dealer, whose offer was valid until 4 July 1996. The plaintiff then wrote to the defendant to terminate the agreement and requested him to have the caveat removed on an urgent basis. The defendant responded to the letter on 4 July 1996, agreeing to the termination, but only managed to remove the caveat on 9 July 1996, by which time the offer from PW2 had lapsed. Hence, this was the plaintiff's claim, *inter alia*, from the defendant for a sum of money as damages for failing to remove the caveat promptly.

The issues for determination were: (i) whether the defendant had a caveatable interest in the land upon the execution of the agreement; (ii) what was the effective date of termination of the agreement; and (iii) whether there was undue delay on the part of defendant in removing the caveat when asked by the plaintiff to do so, which was a breach of cl. 13.2 of the agreement.

Held (dismissing the application):

[1] Based on the agreement, it was not denied that consideration passed between the parties. Therefore, there was in existence a valid and enforceable agreement on the date the caveat was entered by the defendant. Relaying on *Macon Engineers Sdn Bhd v. Goh Hooi Yin*, at the material time, the defendant had a caveatable interest in the land and he was thus perfectly entitled to lodge the caveat to protect his right under the agreement. (pp 559 h & 560 a-c)

[2] The agreement was still subsisting even as late as 18 June 1996. It was not open to the plaintiff to unilaterally terminate the agreement, without giving reasonable notice to the defendant. It was also reasonable for the defendant to take the stand that on 4 July 1996 the agreement was still subsisting. (p 562 a-c)

[3] The agreement was terminated by mutual consent on 4 July 1996 while the caveat was removed on 9 July 1996. Considering all the attendant factors such as the giving of instruction to the solicitors and the necessary documentation for filing with the relevant land registry, a lapse of five days between the date of the mutual termination of the agreement and the eventual removal of the caveat was reasonable. Therefore, the defendant had not been in breach of cl. 13.2 of the agreement. (pp 563 f-h & 564 a-b)

Case(s) referred to:
HA Securities Sdn Bhd v. Ng Kong Yean [1993] 4 CLJ 433 HC ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 2 MLJ 53 ***(foll)***
Nam Bee Rubber Estate Sdn Bhd v. Syarikat Tanaman Perak Bhd [1986] MLJ 29 ***(refd)***

For the plaintiff - V Manoharan (Jasmeetpal Singh); M/s Wan Majid, Mano & Nada
For the defendant - Sri Dev Nair; M/s Riswana & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Arifin Zakaria J:

Background Facts
The plaintiff was the registered owner of a piece of land known as Grant No. 12641, Lot No. 1052, Kuala Kemasin, Mukim Senak, Daerah Bachok, Negeri Kelantan ("the land"). The defendant is a dealer in imported cars through his company called Wang Selamat Sdn. Bhd.

By agreement dated 8 June 1996 ("the agreement") the plaintiff agreed to sell and the defendant agreed to purchase the land for the agreed price of RM1.2 million. The mode of payment is as stipulated in para. 3 of the agreement, which reads:

> 3. The total purchase price for the said property is the sum of Ringgit Malaysia One Million and Two Hundred Thousand (RM1,200,000.00) only which comprise the following:
>
> (a) the said Mercedes Benz duly transferred and registered in the name of the Vendor as the owner at an agreed cost price of RM300,000.00
>
> (b) The AP for the import and/or purchase of another Mercedes Benz; and
>
> (c) The balance shall be payable in cash in Malaysian Ringgit (hereinafter referred to as "cash sum")
>
> (hereinafter referred to as "the Purchase Price").

Upon the execution of the agreement the defendant lodged a caveat against the land to protect his interest under the agreement.

Some three weeks prior to the execution of the agreement the plaintiff went to one of the showrooms belonging to the defendant to choose the car. The plaintiff said she had chosen a Mercedes 300SL. The value of the car was RM300,000. According to her, after she had chosen the car, it will be delivered to her on the date of the execution of the agreement. However, on the date of execution of the agreement the defendant failed to deliver the car as agreed. The plaintiff claimed that the car was not ready because it was not in an immaculate and road worthy condition.

Further, according to the plaintiff, eventhough the agreement was dated 8 June 1996 it was in fact executed on 5 June 1996. Going by this the defendant was supposed to deliver the car by 5 June 1996, but because the car was not ready for delivery by 5 June 1996 she agreed to have the delivery date extended to 8 June 1996. She claimed that the defendant had agreed to deliver the car by the said date. On 8 June 1996 the defendant failed to deliver the car and she called the defendant by phone and she was told by someone who answered her call that the car was not ready. She wrote the letter of 11 June 1996 purporting to terminate the agreement unless the car is delivered to her by 12 June 1996. Then came the respond from the defendant by letter of 13 June 1996 stating he undertakes to have the car delivered by 18 June 1996. At the same time she also received a call from someone called Linda from the defendant's office who told her that the car would be ready for test drive

on 17 June 1996, and thereafter could be registered in her name the next day. She agreed to the extension. On 17 June 1996 she said, she sent her son, Wan Azman, to the defendant's workshop at Sungai Pencala to check on the car. Her son reported back saying that the car was not ready for delivery as yet. On 18 June 1996 she tried to call the defendant and left messages to the defendant to return her call but to no avail. She then consulted her husband who told her that if there was no consideration there was no agreement. Maintaining that after 18 June 1996 the agreement had come to an end she then decided to look for another buyer. She received an offer from one Dato' Abdul Aziz bin Mat (PW2), who is also in the car dealership business. The terms and conditions of the said offer are contained in the letter dated 24 June 1996, the material part of which reads:

Per: Tawaran Membeli Tanah GN 12641 Lot 1052 Kuala Kemasin, Mukim Senak, Bachok, Kelantan

Saya rujukan kepada perkara di atas dan dengan ini menawar untuk membeli tanah tersebut dengan harga belian sebanyak RM1,600,000.00 (Ringgit Malaysia Satu Juta Enam Ratus Ribu sahaja) dengan syarat-syarat berikut:

1. Sebuah kereta Mercedes Benz Model 300SL – 24 1991 berharga RM300,000.00 (Ringgit Malaysia Tiga Ratus Ribu sahaja) akan diserah dan ditukar nama kepada Puan pada hari menandatangani Surat Perjanjian Jual Beli sebagai sebahagian daripada harga pembelian.

2. Baki seterusnya sebanyak RM1,300,000.00 (Ringgit Malaysia Satu Juta Tiga Ratus Ribu sahaja) akan dibayar secara tunai kepada Puan apabila penukaran hak milik dibuat kepada saya atau cara lain yang dipersetujui bersama.

3. Harta tersebut bebas dari caveat pada atau sebelum tawaran ini diterima.

4. Saya dengan ini sertakan sekeping cek PBB No. 294319 berjumlah RM32,000.00 (Ringgit Malaysia Tiga Puluh Dua Ribu sahaja) sebagai wang tanda jadi (Ernest Money) sebanyak 2% sebagaimana yang dikehendaki yang akan dijadikan sebahagian wang pembelian jika Jual Beli berlaku atau dikembalikan balik kepada saya sekiranya tawaran ini tidak diterima.

5. Tawaran ini terbuka sehingga 10 hari daripada tarikh surat tawaran ini.

A sum of RM32,000 was paid by PW2 as earnest deposit.

It may be noted that the letter of offer of PW2 contained two important conditions which give rise to the plaintiff's claim herein.

These are:

(a) the offer is valid for a period of 10 days from the date of the offer; and

(b) the land shall be free from any caveat on or before the acceptance of the offer by the plaintiff.

On 26 June 1996 the plaintiff wrote to the defendant stating that the agreement was terminated on account of the alleged breach by the defendant and she had received an offer to purchase the land from another purchaser and the said offer is valid until 4 July 1996. In the same letter she requested the cooperation of the defendant to have the caveat against the land removed on an urgent basis, at the very latest before 4 July 1996. The defendant in his evidence admitted receiving this letter, but only on 4 July 1996, eventhough the letter was delivered to his office on 1 July 1996. He responded to the letter on 4 July 1996 saying that he agreed to the termination of the agreement and had instructed his solicitors to have the caveat removed. (See p. 28 AB1). However, the caveat was only removed by the defendant on 9 July 1996 by which time the offer from PW2 had lapsed.

It was not disputed that the plaintiff did ask PW2 for extension of the offer but it was turned down by PW2. The plaintiff then put the land up for sale again. She advertised the land in the Malay Mail twice but she received no response. Eventually the land was sold to KELOIL Sdn. Bhd. for the sum of RM800,000. The plaintiff is now claiming the sum of RM800,00 from the defendant as damages for failing to remove the caveat promptly, as a result of which she was deprived of the opportunity of selling the land to PW2 for the sum of RM1.6 million. In the alternative she is claiming the sum of RM400,000 being the difference between the price paid by KELOIL and the price that she would have obtained from the defendant.

In his evidence the defendant stated that prior to the signing of the agreement the plaintiff did make her selection of the car at his bonded showroom at Sungai Pencala. However, on the date of the execution of the agreement the car was not delivered to the plaintiff because it had to go through certain procedures before it can be taken out from the bonded area. The customs duty need to be paid first. It was paid on 13 June 1996, that is five days after the execution of the agreement. The procedures that need to be complied with before the vehicle could be registered in the name of the plaintiff are clearly explained by the defendant in his evidence, which reads:

> Once we paid the import duty the next step was for us to fill in all the JPJ requirements Form ie, forms for registration and for paying road tax. We also had to fill the insurance proposal form by the new owner of the vehicle. Before that it would have to be sent to PUSPAKOM for inspection to see that all the details were according to the form. After PUSPAKOM then only we could send all the forms to JPJ for registration.
>
> The form for registration needed to be filled by the new owner – particulars of the new owner and I/C. In this case Plaintiff did not give me these particulars.

In short, his defence was that eventhough the agreement stipulated that the car shall be released to the plaintiff immediately upon execution of the agreement but the plaintiff was fully aware that this was not possible because of the process that he explained earlier. Thus by conduct the defendant contended that the provisions of cl. 3 of the agreement was never intended to be strictly complied by the parties. According to the defendant after the agreement was signed by the parties the defendant had taken steps to have the car registered in the plaintiff's name. This he said is evident by fact that the defendant had on 13 June 1996 paid the customs duty on the car. In the circumstances, the defendant contended that he had not committed any breach of the, terms of the agreement when the plaintiff decided to terminate the agreement. However, after having accepted the termination by the plaintiff he then took the necessary action to have the caveat removed and it was in fact removed on 9 July 1996.

The Issues

On those facts the issues before the court may be formulated as follows:

(1) whether the defendant has a caveatable interest on the land upon the execution of the agreement;

(2) what was the effective date of termination of the agreement;

(3) whether there was undue delay on the part of the defendant in removing the caveat when asked by the plaintiff to do so.

On the first issue the plaintiff's counsel submitted that for the defendant to have a caveatable interest there must exist a valid and enforceable agreement for the sale of the land. In this case he submitted there was no valid agreement because there is no consideration passing from the defendant to the plaintiff. On that premise counsel for the plaintiff contended *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53, which was relied upon by defendant, has no application in this case. The question here is, whether there is a valid

agreement on the date the caveat was lodged by the defendant. Looking at the agreement it cannot be denied that there are considerations passing between the parties, which comprise of the mutual promises. Therefore, it cannot seriously be argued that the agreement is invalid for want of consideration. The failure of the defendant to deliver the car on the date of the execution of the agreement as stipulated in cl. 3 of the agreement, if anything, would merely constitute a breach of the agreement. I shall deal with this issue in the later part of this judgment. On that premise I hold that there was in existence a valid and enforceable agreement between the parties on the date the caveat was entered by the defendant against the land. Therefore, relying on *Macon Engineers Sdn. Bhd (supra)*, it would appear that at the material time the defendant had a caveatable interest on the land and hence the defendant was perfectly entitled to lodge a caveat to protect his right under the agreement.

Further cl. 13.1 of the agreement expressly provides that after the execution of the agreement the purchaser shall be entitled at the purchaser's own costs and expenses to enter a private caveat against the land. Therefore, the entry of the caveat is nothing more than an exercise of the defendant's right under the said clause.

Clause 2 of the agreement on the other hand provides that the car, which shall be in roadworthy and immaculate working condition, shall be released to the vendor upon the execution of the agreement, and the purchaser shall be authorised thereupon to present the purchaser's private caveat on the land. Going by cl. 2 it would seem that the defendant is firstly required to release the car upon the execution of the agreement and secondly, the defendant is only entitled to lodge the caveat upon the release of the car.

It is common ground that on the date of the execution of the agreement the car was not released to the plaintiff. However, according to the defendant this was not possible because they have to comply with certain procedures. Firstly, they have to pay customs duty on the car. Secondly, the car has to be inspected by PUSPAKOM. After having done all that then the car can be submitted for registration with the Jabatan Pengangkutan Jalan. All these will normally take some time. The plaintiff knew that the car was not ready for delivery on the date of the execution of the agreement but all the same went on to sign the agreement. In her evidence she stated in no uncertain term that she was prepared to extend time to enable the defendant to deliver the car on a later date. In her evidence she said:

> The date of delivery of possession of the car was on 5.6.96 became academic and I did not mind that it be delivered later to ease the situation and not jump to conclusion.
>
> I had given time to the Defendant to ease the situation because it was just human and (sic) nature that one should accommodate the time frame.

On the above premise it can be said that the plaintiff had by her conduct waived strict compliance with cl. 2 of the agreement with regard to the date of delivery of the car. By her own admission the plaintiff agreed that the car may be delivered on a later date. Following that the customs duty on the car was paid on 13 June 1996, after due inspection by the Customs Department. I must add, however, there was some confusion on the particulars of the car as stated in the agreement and that as stated in customs form (D8). However, I find this confusion was satisfactorily explained by DW2. She said the particulars as contained in the agreement was errorneously given by her to the solicitors firm handling this matter. The correct particulars of the car is as stated in the customs form. This was further confirmed by the defendant himself. I have no doubt in my mind that the particulars of the car in the agreement was entered errorneously as explained by DW2.

Going back to the issue of delay in delivery, according to the evidence of the plaintiff herself, she agreed to the extension of the date of delivery of the car to 18 June 1996 on the undertaking by defendant and DW2 that the car will be ready for delivery on that day. Following that she sent her son to the defendant's workshop at Sungai Pencala to check on the car. She said her son came back and told her that the car was still not in a roadworthy condition. She told the court that after 18 June 1996 she tried to contact the defendant but failed to get any response from him. Then she consulted her late husband, who was a lawyer. Having taken his advice she maintained that after 18 June 1996 there was no more agreement that bound her.

It should be noted that up to that date the only letter intimating her intention to terminate the agreement was her letter of 11 June 1996. In the said letter she demanded for the car to be delivered on the next day failing which she will treat the agreement as terminated with immediate effect. But this threat of termination was not put into effect because even as late as 18 June 1996 she was still prepared to accept delivery of the car. As stated earlier she even sent her son to check on the car on 17 June 1996.

In the circumstances, I am of the view that the agreement was still subsisting even as late as 18 June 1996 and it is not open to the plaintiff to unilaterally terminate the agreement, without giving reasonable notice to the defendant. From the bundle AB-I the only letters that talk of termination of the agreement are found at pp. 18 and 27 of the bundle. However, on reading these letters one would notice that only the captions made reference to termination of the agreement. The body of the letters made no mention of it at all. These letters could not in my view constitute a proper notice of termination of the agreement. They were concerned solely with the issue of the removal of caveat.

Based on the above it is, therefore, reasonable for the defendant to take the stand that on 4 July 1996 the agreement was still subsisting. And consistent with this view the defendant wrote to the plaintiff on 4 July 1996. The letter reads:

> July 4, 1996
>
> Puan Nazirah binti Ismail,
> 171-6, Sri Wang Ria,
> Jalan Ara Bangsar,
> Kuala Lumpur.
>
> Dear Madam,
>
> **SALE & PURCHASE OF PROPERTY HELD UNDER GN 12641 NO. LOT 1052, KUALA KEMASIN, MUKIM OF SENAK, KELANTAN**
>
> I refer to the above matter and to your letter dated June 26, 1996.
>
> 2. As you may be aware, notwithstanding any provision provided under the Sale and Purchase Agreement dated June 8, 1996, it has been agreed between us that we will deliver the car to you upon execution of the Sale and Purchase Agreement but you are to redeliver the same to our workshop for inspection and repairs where necessary. As such there is no breach on our part. However, I am agreeable to have the Sale and Purchase Agreement dated June 8, 1996 terminated and I have instructed my solicitors, namely Riswana & Co. to have my private caveat withdrawn.
>
> Yours sincerely,
>
> Sgd.
>
> Mohamed Fauzy Abdul Hamid

By this letter the defendant agreed to have the agreement terminated by mutual consent. Following this the caveat against the land was eventually removed on 9 July 1996.

Clause 13.2 of the agreement relates to the removal of caveat, it reads as follows:

> 13.2. The Purchaser shall at the Purchaser's own costs and expense withdraw or cause to be withdrawn the aforesaid private caveat **forthwith** upon any lawful termination of this Agreement by the Vendor as a result of the Purchaser's breach of any of the provisions herein pursuant to the provisions herein. (emphasise added.)

Under the above clause it is incumbent on the defendant to withdraw or cause to be withdrawn forthwith any private caveat against the land upon lawful termination of the agreement.

The plaintiff contention is that the defendant failed to withdraw the caveat "forthwith" as provided in the said clause. What is the meaning to be assigned to the word "forthwith" as used in this clause. Abdul Malek J (as he then was) in *H.A. Securities Sdn, Bhd. v. Ng Kong Yean* [1993] 4 CLJ 433 following a long line of authorities held the view that the word "forthwith" "... means without delay and as soon as practicable or as soon as is reasonably possible." In *Nam Bee Rubber Estate Sdn. Bhd. v. Syarikat Tanaman Perak Bhd* [1986] MLJ 29, one of the cases relied upon by Abdul Malek J, Hashim Yeop A. Sani SCJ (as he then was) opined that: "The word forthwith means 'without any delay or loss of time' and a word which does not imply delay but quite the reverse."

Finding Of The Court

In the present case, it is my finding that the agreement was terminated by mutual consent on 4 July 1996. The plaintiff was duly informed of the defendant's decision accepting the termination of the agreement *vide* defendant's letter of the even date. The caveat was removed on 9 July 1996. The issue is whether the defendant had taken action "forthwith" or "without delay" in removing the caveat. In this regard I think we have to take into consideration several factors. Firstly we need to take into account the fact that the defendant need to give the necessary instruction to his solicitors, who all along had been acting for him. This appears to have been done on 4 July 1996 itself. Having got the instruction, the solicitors need to prepare the necessary documentation for filing with the relevant land registry. Secondly we have to take into account the fact that the relevant land registry here is

located in Kota Bharu, Kelantan. Therefore, the notice of withdrawal will need to be filed in Kota Bharu. This of course will take much longer than the case where the land registry is in Kuala Lumpur. Considering all these attendant factors I am of the view that, a lapse of five days between the date of the mutual termination of the agreement and the eventual removal of the caveat, is in the circumstances, highly reasonable. On that premise I would hold that the defendant had not been in breach of cl. 13.2 of the agreement.

For the above reasons it is my finding that the plaintiff, on balance of probabilities, failed to prove her case against the defendant. I, therefore, dismissed the plaintiff's claim with costs.